U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 February 2004

Case No. 2003-AIR-7

In the Matter of

JAISON E. KINSER

Complainant

v.

MESABA AVIATION, INC.
d/b/a MESABA AIRLINES

Respondent

APPEARANCES:

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SEHAM, SEHAM, MELTZ & PETERSEN, LLP
St. Paul, Minnesota
For Complainant

Gregg S. Avitabile, Esq.
Douglas W. Hall, Esq.
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Washington, DC
For Respondent

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER

This case arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, 49 U.S.C. § 42121, ("AIR 21" or "Act"). This statutory provision, in part,

prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration (FAA) or any other provision of Federal law relating to air carrier safety.

Complainant was employed by Mesaba Aviation, Inc., d/b/a Mesaba Airlines (hereinafter "Mesaba" or "Employer") from November of 1999 until his voluntary resignation on November 1, 2002. On August 13, 2002, Kinser filed a complaint with the Department of Labor alleging that he was discriminated against for informing his employer of several violations of FAA standards. His complaint was denied on October 14, 2002 by the Office of Safety and Health Administration (hereinafter "OSHA") and Kinser appealed that ruling and requested a formal hearing on December 3, 2002. Complainant's allegation of discrimination under Section 519 of AIR 21 was then referred to the Office of Administrative Law Judges for a hearing. A formal hearing was held in Cincinnati, Ohio, from May 27, 2003 until May 30, 2003. Post-hearing briefs were filed by both parties.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the standards of the regulations.

References to "JX" and "CX" refer to Joint Exhibit and Complainant Exhibit respectively. The transcript of the hearing is cited as "Tr." and by page number.

POSITIONS OF THE PARTIES

Jaison E. Kinser (hereinafter "Complainant" or "Kinser") contends that his reports to management about improper overrides of discrepancy reports and his refusal to sign off on two separate C-checks were protected activity under Section 519 of

AIR 21. He also alleges that Respondent discriminated against him because of his protected activity through shift reassignment, disciplinary letters, furlough, rescission of his Required Item Inventory designation, and his overall treatment by his immediate supervisor.

It is Respondent's position that Complainant did not engage in protected activity. If Complainant's activities are found to be protected, Respondent asserts that Complainant is time-barred from including some of his alleged protected activities in this claim; that other activities are not properly before the Court as they occurred after the complaint was filed; and that for the remaining activities, there is no nexus between the protected activity and the adverse employment action.

On November 14, 2002, Respondent submitted a Motion to Strike Portions of Complainant's Post-Hearing Brief. Respondent contends that certain statements made in the brief are presented as facts, but are not supported by the evidence of record. On November 26, 2002, Complainant responded to Respondent's Motion supporting his characterization of the evidence with references to the record. The record evidence will speak for itself. The Court is not bound by either party's factual findings. Therefore, Respondent's Motion is denied.

ISSUES

1. Whether a claim based upon Complainant's conduct and Respondent's alleged retaliatory action and discipline occurring outside of the 90-day limitation period is time barred;

2. Whether Complainant's conduct and Respondent's alleged retaliatory action and discipline occurring outside of the 90 day limitation period is relevant to the case;

3. Whether Complainant engaged in protected activity;

4. Whether Complainant suffered any adverse employment action;

5. Whether Respondent disciplined or retaliated against Complainant because he engaged in protected activity;

6. Whether the complaint filed was frivolous and brought in bad faith, entitling Respondent to attorney fees; and

7. Whether Complainant is entitled to compensatory damages, lost wages, attorney fees and costs.

CREDIBILITY FINDINGS

I have carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence, while analyzing and assessing its cumulative impact on the record. *See, e.g., Frady v. Tennessee Valley Authority*, 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995)(citing *Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979)); *Indiana Metal Products v. National Labor Relations Board*, 442 F.2d 46, 52 (7th Cir. 1971). An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *See Altemose Constr. Co. v. National Labor Relations Board*, 514 F.2d 8, 15 n. 5 (3d Cir. 1975).

I have based my credibility findings on a review of the entire testimonial record and associated exhibits with regard for the reasonableness of the testimony in light of all record evidence and the demeanor of the witnesses. Probative weight has been given to the testimony of all witnesses found to be credible. The transcript of the hearing contains the testimony of eight witnesses.

Dale C. Armstrong was the Director of Quality Control and Engineering at Mesaba from January 29, 2001 until September 24, 2001. (Tr. 238). I find Armstrong's testimony to be credible. Although he could not recall specific details regarding the incidents involving Complainant, he gave knowledgeable testimony about the operations of Mesaba. He was a forthright and independent witness.

Aaron W. Perry worked for Mesaba at the Cincinnati Maintenance Base for five years as a mechanic. (Tr. 453). At the time of the hearing, Perry was still working as a mechanic for Mesaba and was the Cincinnati area representative for the mechanics' union. (Tr. 454). I find Perry's testimony to be

credible. He testified about his own experiences working as a mechanic for Mesaba, working with management and co-workers and the details of his own safety complaints to Mesaba. His testimony was consistent and honestly given.

Bradley D. Baker has been the Chief Engineer at Mesaba since 1996. (Tr. 623). At times during Kinser's employ, Baker also served as the Acting Director of Quality Control and Engineering. From November of 2001 to August of 2002, Mr. Baker served as the Acting Director of Quality Control at Mesaba. (Tr. 623, 705). Baker was stationed at the Minneapolis headquarters. I find Baker's testimony to be credible overall. He testified about his knowledge of the operations of Mesaba over his eighteen years of experience with that company. He was responsive to questions and thorough in his answers. I found Baker to be not entirely forthcoming regarding certain e-mail messages between members of management and regarding the tension in the maintenance department at Mesaba's Cincinnati base. However, overall I find Baker to be a credible witness.

Wesley P. George began working for Mesaba at the Cincinnati Maintenance Base in September of 2000 as a mechanic. (Tr. 887). In April 2001, he began working as an inspector and worked in that capacity until September or October of 2002. George was a co-worker of Kinser and testified as to events that occurred during their working relationship. I find George's testimony to be very credible. His testimony was consistent and honestly given.

At the time of the hearing, Terry M. Holman had been employed by Mesaba at the Cincinnati Maintenance Base for three years. (Tr. 560). He began as a mechanic and later worked as an inspector. Holman was a co-worker of Kinser and testified about his work experiences at Mesaba and with Kinser. I find Holman's testimony to be very credible.

Daniel B. Miller was employed by Mesaba from June 12, 2002 until April 9, 2003. (Tr. 779). He started out as a mechanic, then worked as an inspector, and finally was promoted to a quality control manager in April of 2001. (Tr. 780). As a quality control manager, Miller was responsible for overseeing the inspectors and the inspections taking place at the Cincinnati Maintenance Base. Miller was Kinser's immediate supervisor. I find Miller to be a credible witness.

James S. Schafer has worked for Mesaba for fourteen years and has worked as a mechanic and an inspector. Schafer was

stationed at the Detroit Maintenance Base and was the Aircraft Mechanics Fraternal Association (hereinafter, "AMFA") union representative for mechanics and inspectors working at Mesaba's Detroit and Cincinnati Maintenance Bases. I find Schafer's testimony to be partially credible. His responses to questions posed regarding his role at the grievance hearing were vague and inconsistent. In view of the record as a whole, I find his statements about the working environment and circumstances at the Cincinnati Maintenance Base to be exaggerated, particularly as Schafer was stationed in Detroit and had little direct or personal exposure to the working environment at the Cincinnati Maintenance Base.

I find the testimony of Jaison E. Kinser, Complainant, to be credible in part. I found him to be very knowledgeable about the technical aspects of his former employment. However, at times his testimony was inconsistent and conflicted with deposition testimony or statements he made contemporaneously with events relevant to the claim. Particularly, Kinser's testimony regarding the April and July 2002 C-checks is internally inconsistent, inconsistent with a prior deposition, and inconsistent with statements made close in time to those events. In addition, I found his testimony to be deliberate and I found him to be unresponsive at times during his testimony. Therefore, I find Kinser's testimony to be only partially credible.

FINDINGS OF FACT

Background

In November of 1999, Kinser was hired as a mechanic to work for Mesaba at its Cincinnati Maintenance Base. Mesaba is a passenger airline with its headquarters in Minneapolis, Minnesota and serves the Midwest, Northeast and Southeast United States. (Tr. 638). Mesaba operates four main maintenance bases, which are located in Minneapolis, Memphis, Detroit and Cincinnati. In addition, Mesaba has a maintenance base in Wisconsin. At the time of Kinser's employment with Mesaba, the company owned 108 airplanes and maintained a flight schedule of approximately 800 departures per day. (Tr. 145, 639).

As a mechanic, Kinser was required to hold FAA airframe and/or powerplant licenses. (JX 19, Tr. 149-50). Kinser held both licenses. (Tr. 149-50) At Mesaba, mechanics were responsible for scheduled and unscheduled maintenance of the aircraft. Mechanics remedy "discrepancies" in the aircraft. A

"discrepancy" is "anything that is wrong with the aircraft" such that it is not in the condition it was when certified. (Tr. 49-50). For example, a faulty landing gear would be a discrepancy as would a missing light shade inside the aircraft.

Kinser worked as a mechanic until April of 2001, when he took the position of Inspector, which included a pay increase of $1.15 per hour. (Tr. 45, 176). As an inspector, Kinser's duty was to review work performed on aircraft by mechanics and also to review the paperwork regarding the maintenance performed, ensuring that everything was correct and complete. (Tr. 153). Kinser received inspector training at Mesaba. (Tr. 51).

Aircraft Inspections

Both mechanics and inspectors were involved in C-checks of aircraft at Mesaba. A C-check is a scheduled inspection of aircraft that must be performed approximately every 4,000 flight hours. (Tr. 49). This is a major inspection which can take two to six weeks or longer to complete. (Tr. 49, 265). When an aircraft due for a C-check was brought into the Cincinnati Maintenance Base, the mechanics would first ready the aircraft for inspection by opening panels and cleaning it. (Tr. 256). After this was completed, the inspectors would tour in and around the aircraft while completing task cards, Form MM-409, which designated features to look for as part of the inspection. Generally, the inspectors look for discrepancies that required repair or replacement. (Tr. 49). The inspectors would write any discrepancies found on an MM-409. At the end of the initial inspection tour, approximately 300 MM-409s could be generated. (Tr. 256). Using the MM-409s, the mechanics and other maintenance personnel make the required repairs or replacements dictated by the discrepancies stated on the cards. (Tr. 49). The mechanics record the corrective action taken by them on the MM-409. Once the repairs and replacements are made, the inspectors review the work performed and ensure that it was done correctly. This portion of the process is referred to as "buying back." (Tr. 99-100). The inspector must witness what he is buying back, that is, he must observe the maintenance work performed and ensure there are no remaining discrepancies. Once the inspector is satisfied that the work is complete and correct, he or she then signs the task card. (Tr. 70, CX 5). The MM-409 consists of four copies to be distributed among different departments. One copy is maintained by the mechanic who performed the work, a second by the Quality Control Department, a third by the Planning Department and a fourth by the Records Department. (Tr. 55).

Once the MM-409 is complete, the information from the card is transferred to a tally sheet, referred to as Form MM-08. (Tr. 262-63). The MM-08 lists the serial number of each MM-409 for the C-check of that aircraft, the work order number generated for the discrepancy listed on the MM-409, and a description of the work performed or action taken. (JX 3). In addition, the MM-08 contains a column entitled "Review Signature" for the reviewing inspector to sign next to each MM-409 number and another column for the inspector to check whether the work was completed or not. Once an inspector has bought back the MM-409s by ensuring the work is correct and signing off on the card, the inspector would put his signature in the "Review Signature" column and check whether the work was complete or not for that particular MM-409. (Tr. 262-63). The completed MM-409s are to be kept and maintained with the MM-08.

Using the MM-08 and the MM-409s, the C-check can be finalized or "signed off" by an inspector. It is the inspector's responsibility at this point in the C-check to ensure that all signatures are present on the MM-08 and that all MM-409s are physically present. (Tr. 662). These procedures are outlined in Mesaba's General Maintenance Manual (GMM), which is derived directly from the Federal Aviation Regulations. (Tr. 265, JX 20, JX 21). Once an inspector signs off on the C-check, the aircraft is ready to return to service. (Tr. 659-62).

Discrepancies found during a C-check need not always be rectified immediately in order to release the aircraft to service. If a discrepancy is minor and does not affect the safe operation of the aircraft, the repair or replacement of that item may be deferred. (Tr. 54). If the repair or replacement of an item is deferred, the inspector or mechanic designates the item as a "planning watch item." (Tr. 278-79). As a planning watch item, the item is tracked and needed parts are ordered or steps are taken to rectify the discrepancy for that item. The repair or replacement must be done within 150 flight hours of the creation of the watch item. (Tr. 279).

In addition to the C-check, other types of scheduled maintenance are performed on the aircraft at Mesaba. Inspectors and mechanics also engage in A-checks on the aircraft. An A-check is not as comprehensive as a C-check and is generally performed on an aircraft overnight before the plane is used for service the next day. (Tr. 130).

July and August 2001 Inspections

Kinser participated in both A-checks and C-checks in his work as a mechanic and inspector.

When Kinser began working as an inspector, his immediate supervisor, the Manager of Inspection, was Joe Long. (Tr. 45). Within a few weeks, Long became the C-check supervisor and Daniel B. Miller became the Manager of Inspection and Kinser's immediate supervisor. On April 23, 2001, Miller completed a performance appraisal on Kinser's performance. The appraisal noted that Kinser's performance met or exceeded expectations; however, Miller had only been Kinser's supervisor for a short time at the time of the appraisal. (Tr. 123-24).

In July of 2001, Kinser was working as an inspector on the day shift. He was working on a C-check, performing the cabin inspection. (Tr. 53). During this inspection of the cabin, Kinser noted that the cargo bin latch shrouds on several of the overhead cargo bins were missing or broken. A cargo bin latch shroud is a protective plastic cover shielding the actual latch mechanism that keeps the door of the cargo bin shut so that stored luggage remains contained. (Tr. 52-53). The shroud protects stored luggage and clothing from catching on the latch mechanism and being damaged. The shroud also protects luggage from damaging the latch itself. (Tr. 637). The shroud does not aid in ensuring that the cargo bin door remains closed. (Tr. 636-37). Kinser wrote up the missing or broken latch shrouds on an MM-409, identifying them as discrepancies so that they would be replaced. He designated these items as discrepancies because they were "not in the original condition that the aircraft was received in, which is a discrepancy, and it also raises a safety issue of what would…happen to the overhead cargo bin doors in flight." (Tr. 51).

Once the MM-409s designating the missing or broken latch shrouds came to Miller's attention, he spoke with Kinser about them. (Tr. 53). Miller told Kinser that the "discrepancies were minor" and that it was unnecessary to write them up. (Tr. 53). Regarding this belief, Miller testified,

> I thought they were merely cosmetic items. There was no reference in the component maintenance manual or in the aviation maintenance manual, the aircraft maintenance manual, that called out part numbers or

> anything about these parts other than a very small picture presentation. There was no requirement or reference to replacing them or fixing them or anything of the sort.

(Tr. 781). Furthermore, in Miller's experience, no one had written up broken or missing shrouds prior to Kinser.

Miller spoke to all of the inspectors, with Kinser present, following his conversation with Kinser. He told the inspectors that if they wrote up any more discrepancies concerning the latch shrouds that he would "break their fingers." (Tr. 58). Miller testified that he made this statement in a joking manner, that the "relationship [he] had with the rest of the inspectors was such that [they] joked around in that kind of manner." (Tr. 782).

On August 9, 2001, Kinser was engaged in another C-check. When performing the cabin inspection, he again noted missing or broken latch shrouds and wrote them up as discrepancies on MM-409s. (Tr. 55, JX 2). When Miller discovered the MM-409s for the latch shrouds, he asked Kinser why they were written up in light of his previous request in July to not write up these items. (Tr. 55). Kinser explained that he believed that it was his job to write them up as they needed to be replaced. (Tr. 55). Kinser testified that Miller then asked for his copies of the MM-409s, while holding other copies of MM-409s Kinser had previously written up that had been torn in half. Miller told Kinser that the MM-409 copies were "proprietary information" and that he was not permitted to keep them. (Tr. 56).

After speaking with Kinser, Miller sent an e-mail to Dale C. Armstrong, who was the Director of Quality Control and Engineering for Mesaba at that time. (JX 1). Miller explained that he had spoken to Kinser previously, requesting that minor discrepancies, such as the missing or broken latch shrouds, not be written up on MM-409s. He related that in July he jokingly threatened to "break his fingers" if he wrote up such minor discrepancies again. Miller further described the incident on August 9, 2001,

> [Kinser] wrote up the same discrepancies again. I did not talk to him about it at the time, I just simply voided out the 409's. This most recent C-Check inspection has been complete since last Tuesday (Aug. 7th), and today he started to write up the

> same things. I went to him and told him that I had voided the two 409's that he'd written, and that I wanted his copies…. He flatly refused to give them to me stating that "They are my copies" and that the writeups were valid discrepancies. I told him that I had specifically told him not to write these items up, and he replied that "you didn't tell me not to. You threatened me." I explained that at the time it was said, that it was meant in humor and that he knew it. I also explained that by refusing a direct order, he could be written up, that all the 409's copies were proprietary information and belonged to the company, not him and that by refusing to comply with my request to give them up constituted insubordination and could results in his being terminated and walked out immediately. His response was "Go for it." As far as I'm concerned, this is in direct violation of the company rules regarding insubordination, and data security, and following specific work instructions given by a direct supervisor.

(JX 1).

Armstrong telephoned Miller in response to Miller's e-mail to inquire more about the incident and inform Miller that he could not tell Kinser not to report discrepancies. (Tr. 238, 784). Based on the e-mail and his conversation with Miller, Armstrong traveled to the Cincinnati Maintenance Base to meet with both Miller and Kinser. (Tr. 239). When Armstrong came to Cincinnati, he met with Miller and Kinser individually and together. (Tr. 238-40). Armstrong explained to Miller that "his conduct was inappropriate both in threatening to break an employee's fingers and then in destroying aircraft records." (Tr. 240). Armstrong cautioned Miller that he could not discourage Kinser or other inspectors from "writing up discrepancies of any kind." (Tr. 785).

When Armstrong met with Kinser individually, he affirmed that Kinser was to write up discrepancies. (Tr. 239). Kinser remembered that Armstrong told him that Miller's tearing up of the 409s was incorrect and that if Miller "was ever going to countermand a write up or tell [him] that the write up was not a

legitimate write up, that he had to have a manual reference either out of our aircraft Maintenance Manual, GMM or out of the FAA regulations." (Tr. 60). Kinser testified that Armstrong told him to call if there were any more problems.

Armstrong reiterated the points made in the individual meetings when he met with both Miller and Kinser. Armstrong testified,

> I thought that we had come out of that…meeting with an amiable agreement that we would respect each other as gentlemen and fellow employees and that Jaison did have the right to write things up that were wrong with the airplane and the procedure is in the manual to handle things that we couldn't fix at that time. Those plastic latch covers that we're talking about, are not safety of flight issue. They're…something put on there to protect passenger bags…so we can fly without them. We put them on a watch item, and I'm sure that when I left there, everything was taken care of, that we wouldn't have to face this again.

(Tr. 240). Although the latch shrouds are not an item affecting the safety of flight, Armstrong explained that had the shrouds not been replaced or deferred that "the plane would have been in an unairworthy condition until the covers were repaired or deferred." (Tr. 277).

During Armstrong's visit, the original MM-409s, that had been torn in half, were taped together to be retained. Armstrong told Kinser to turn the latch shroud discrepancies into a planning watch item so that they could be replaced. (Tr. 65). Armstrong stated that as the MM-409s were taped back together that there was no violation of FAA regulations as the cards could be retained in Mesaba's records. (Tr. 270). When Kinser saw the MM-409s again, Miller had drawn a line across each card, initialed them and wrote "EIE", which stands for "Entered in Error." (Tr. 61). Writing EIE on an MM-409 was a method used at Mesaba to correct mistakes. (Tr. 62). Therefore, if an inspector makes a mistake in filling out the MM-409, he can void the card by writing EIE on it and the information will not be entered into the database. (Tr. 62). The effect of EIE is that the information from that MM-409 would not be entered into the database.

In August of 2001, Kinser also wrote up other discrepancies. On August 24, 2001, Kinser reported a nick on the wing skin of an aircraft on an MM-409. (JX 4). Long, the C-Check supervisor, reviewed the MM-409 and did not perceive it to be a "viable discrepancy," finding it to be a small scratch. (Tr. 787). For the corrective action on the MM-409, Long wrote that the nick did not affect the airworthiness of the aircraft and signed off on the MM-409. He brought the MM-409 to Miller's attention, who agreed with Long's corrective action and signed off on the card as well. (Tr. 789). Neither Miller nor Long told Kinser about their actions regarding this particular MM-409. Kinser was told by another inspector who noticed what he felt was an atypical corrective action on the MM-409. Kinser believed the corrective action was improper and that a reference to the GMM was required in order to dispose of a discrepancy in that manner. (Tr. 75-76). On August 24, 2001, Kinser sent an e-mail to Miller questioning the corrective action on the MM-409:

> Where is your reference stating that this or any amount of damage in the wing skin is allowable?...I cannot allow this to pass. There is potential for propagation of the damage that could cause greater problems in the future.

(JX 12). In addition, Kinser referenced a section from the aircraft's Structural Repair Manual. Armstrong testified that the original corrective action was inappropriate. He explained that if a discrepancy is negligible, it cannot simply be signed off as such on the MM-409 but that the Structural Repair Manual or the GMM should be referenced. (Tr. 247). Miller testified, that Long decided to burnish the nick and replace the boot to avoid further problems over the incident. (Tr. 789). After the repairs were made, Long crossed out the original corrective action on the MM-409 and wrote in the repairs done and referenced the Structural Repair Manual. (JX 12).

On August 19, 2001, he reported radome damage on an aircraft. (JX 12). The radome is a panel on the nose of the aircraft made of "composite material" which allows the radar beneath it to penetrate. (Tr. 83). Kinser noted impact damage to that panel and a tear in the radome boot. He believed this damage to be a safety issue and completed a MM-409 accordingly. Kinser checked on the status of that aircraft later in August and found that it had been repaired. (Tr. 84). When Kinser later saw the MM-409s for these discrepancies, he noted a

crossed out corrective action and a second corrective action indicating repair, similar to the wing skin nick incident.

Shift Change

As was noted above, James J. Schafer was the Mesaba airline representative for the AMFA who worked at the Detroit Maintenance Base. (Tr. 477). Schafer was the union contact for union employees at both the Detroit and Cincinnati Maintenance Bases. Schafer testified that in August of 2001, he was contacted by Miller regarding Kinser. (Tr. 477). Schafer recalled that Miller telephoned him and asked how he could "get rid" of Kinser. (Tr. 478). According to Schafer, Miller stated that he was having problems with Kinser and wanted him out of the Quality Control department and wanted to move him back to the Maintenance department. Miller testified that he did not recall this conversation with Schafer. (Tr. 784).

After this alleged telephone conversation, Schafer contacted Kinser and informed him of Miller's intentions. (Tr. 446). In addition, Kinser recalled that Schafer told him that he would be "under increased scrutiny, and that anything I did was going to be looked at, or they were going to try to find some fault in my work." (Tr. 446).

Kinser testified that during Armstrong's visit, Armstrong told Miller that he could not discipline Kinser for writing up discrepancies on the latch shrouds. (Tr. 85). Kinser stated that Armstrong informed Miller that, instead of disciplining Kinser, he could reassign Kinser to night shift for "operational purposes." (Tr. 85). Armstrong recalled a conversation with Miller in which he mentioned opening an inspector position for the night shift. (Tr. 242). He testified that Kinser's name might have been mentioned as a possibility for the night shift inspector position as there was a "personality conflict" between Miller and Kinser. As an inspector, Kinser had been working the day shift from 7:30 a.m. to 6:00 p.m. On August 21, 2001, Kinser received a memorandum informing him that he was to begin working the night shift on August 29, 2001. (JX 5, Tr. 85). The night shift began at 11:30 p.m. and ended at 8:00 a.m. (JX 6).

On September 13, 2001, Kinser completed a "system bid" to designate a preferred working shift. (JX 6). The bid form contained five shift choices. Two shifts represented a day shift beginning at 7:30 a.m. and ending at 6:00 p.m., but the two shifts varied in which days of the week were worked. A

third shift represented a day shift beginning at 8:00 a.m. and ending at 6:30 p.m. The two remaining shifts represented a shift beginning at 11:30 p.m. and ending at 8:00 a.m., but varied in days of the week worked. As his first choice, Kinser chose the day shift beginning at 8:00 a.m. His second choice was for one of the day shifts beginning at 7:30 a.m. and his third choice was for one of the night shifts. Kinser desired the day shift to better deal with family obligations. (Tr. 87). Kinser was awarded the night shift position. He believed that he was assigned the night shift by Miller in retaliation for reporting safety issues to Armstrong. (Tr. 91). He based this belief on Armstrong's statement that Miller could not discipline him for writing up the latch shrouds, but that Miller could reassign Kinser to another shift.

Miller testified that Kinser was reassigned to the night shift for several reasons. (Tr. 796-98). First, Miller explained that Kinser was second lowest in seniority among the inspectors. Wesley P. George had the least seniority and was already assigned to the night shift. Thus, Kinser had the least seniority among the day shift inspectors and was subject to reassignment. Second, Miller stated that Kinser's original job was to be on night shift. The open inspection position which Kinser accepted in April 2001 was a night shift position. (Tr. 850). Third, Miller claimed that he reassigned Kinser to the night shift to remove him from the other inspectors. He believed Kinser to be "difficult to work with, sometimes uncooperative, and had a tendency to want to bait people." (Tr. 797). Miller alleged that he was told by other inspectors and mechanics that they were often unable to find Kinser during work hours when they needed him, that they suspected him of sleeping in the office, and suspected that he left work premises during his shift. Kinser was never disciplined for any such actions. (Tr. 852).

On March 21, 2002, Kinser filled out another system bid to designate his preferred working shift. (JX 7). At this time, Kinser chose the night shift as his first choice, which he was awarded.

March 2002

In March of 2002, Aaron W. Perry, an airframe and powerplant mechanic at Mesaba, reported safety concerns to his union, the Aircraft Mechanics Fraternal Association (AMFA), and to Mesaba. (Tr. 454). The incident causing Perry's safety concerns involved a request that he perform maintenance inside a

fuel cell on an aircraft and his subsequent treatment upon refusal to do this action. Perry testified that entering a fuel cell tank to perform maintenance requires special procedures as the space is very small and the contained fuel requires special safety precautions. (Tr. 455). When a lead mechanic asked Perry to perform the maintenance in the fuel cell tank, he refused, explaining his concerns that he did not feel safe in doing so. The lead mechanic assigned Perry another task. However, approximately an hour after his refusal, Perry was called into a conference room where Miller, the lead mechanic, and Human Resources personnel were present. Miller explained to Perry that if he did not perform the fuel cell tank maintenance that he would be terminated. Perry continued to refuse explaining that he had concerns "about being able to perform effectively and safely in a confined space" as he was claustrophobic. (Tr. 459, 461). Perry submitted a statement to the AMFA after this incident and called Mesaba's safety hotline. (Tr. 454). Perry testified that at Mesaba, the practice had been that if an employee was uncomfortable doing a task or had a legitimate reason for not doing the task, volunteers would be sought for the task. (Tr. 459).

On March 22, 2002, Schafer sent a letter to Scott Bussell, Mesaba's Vice President of Technical Operations. (JX 8). The letter explained the circumstances surrounding the fuel cell tank incident and the threat of termination asserted by Miller. Bussell responded to Schafer's letter on March 26, 2002, and informed Schafer that he passed the information on to the Director of Safety at Mesaba, Mike Anderson, so that he could begin an investigation. (JX 9). Also on March 26, 2002, Anderson sent a letter to Schafer stating that he would be conducting a formal investigation and requested specific information and documentation regarding the incidents expressed in Schafer's letter to Bussell. (JX 10).

Anderson visited the Cincinnati Maintenance Base in March 2002. During this visit, he interviewed many of the mechanics and inspectors to inquire of their possible safety concerns. (Tr. 91). Anderson and Kinser met for such an interview. Kinser told Anderson about the incidents with the latch shroud discrepancy reports of July and August 2001 and his reports of the radome and wing skin damages. (Tr. 93). Kinser expressed his concern that "the maintenance supervisor was signing off maintenance discrepancies and they were being approved by the inspection manager and that they were the two highest ranking people at the base, and that there was nobody to second guess them or double check them." (Tr. 93). Anderson requested that

Kinser provide him with evidence of these incidents and a statement summarizing his concerns. On March 30, 2002, Kinser composed his statement to Anderson and sent it. (JX 11).

After completing the investigation, Anderson issued a report summarizing his findings on April 4, 2002. (JX 12). Regarding the latch shroud discrepancies, Anderson found that the information from the MM-409s was never entered into Mesaba's maintenance database, but that they were listed on the MM-08 as planning watch items and were checked off as complete. Anderson was unable to discover whether the missing or broken latch shrouds had been replaced through a search of the various records. Anderson concluded that "there apparently was inadequate follow through and it appears these discrepancies have never received subsequent attention or corrective action."

In the report, Anderson also addressed Kinser's allegation that Miller and Long "conspired to falsify" three MM-409s regarding the radome and wing skin discrepancies reported by Kinser. (JX 12). Anderson was "unable to substantiate the implied allegation," but found that the event "raise[d] questions about the judgment shown by these management personnel."

Upon further investigation, Anderson discovered that the latch shrouds had been replaced on the aircraft reported by Kinser in 2001. (JX 12). Anderson issued a letter on May 24, 2002, which stated that the aircraft had been inspected and it was noted that the shrouds had been installed. However, Anderson noted that the documentation of the installation was not located. This letter also addressed a "coaching and counseling session" conducted by Anderson and Bradley D. Baker, the Acting Director of Quality Control and Engineering at the time, with Miller and Long. Anderson detailed that "[b]oth individuals were counseled on their leadership and managerial responsibilities, including expectations regarding the use of decision making and judgment skills." (JX 12).

Baker testified about his reactions to Kinser's complaints to Anderson. Baker stated that Mesaba encourages employees to express their concerns and suggestions for improvement. (Tr. 632). However, Baker was "concerned about the bringing up of the bin latch shrouds because I thought that issue had been resolved and taken care of." (Tr. 632).

The April 2002 C Check

On April 10, 2002, a C-check was being performed on aircraft number 535. In the late afternoon, Doug Boeh, a lead mechanic, spoke with Miller and informed him that the aircraft would be ready to be signed off at approximately 9:00 p.m. that evening. Miller requested that Boeh call when the aircraft was ready so that Miller could come in and sign off on the plane. (JX 14).

The work required on the aircraft was not completed by 9:00 p.m. Boeh called Miller and informed him of this. Miller replied that were the plane to take much longer, he would have Kinser sign off on the aircraft when he came in for his shift. (JX 14).

Kinser reported for work at 11:30 p.m. on April 10, 2002. (Tr. 112). Kinser testified that soon after he reported for work he received a phone call from Miller asking if he was "comfortable" signing off on a C-check that was due for service the next morning. Kinser replied that he was not "comfortable" signing off on the C-check at that time. Miller asked to speak with Doug Boeh, a maintenance supervisor, if he would sign off on the C-check. Although Boeh was not an inspector, he held Required Item Inspection (RII) authorization, which enabled him to sign off on a C-check. Boeh agreed that he would. Kinser testified that he did not feel comfortable signing off on the C-check because he had no "knowledge about the aircraft other than one minor discrepancy repair" that he bought back. (Tr. 113). He felt that Boeh had more knowledge of that particular C-check because he had been working on it that entire day. However, Kinser also testified that he refused Miller's request because he believed that Miller was asking him to sign off on the C-check without checking the paperwork and without the C-check being complete. (Tr. 332-34). Although Kinser stated that Miller did not make this alleged request in exact words, it was Kinser's interpretation of his request based on previous "strange questions" Miller had asked. (Tr. 334). By "strange questions," Kinser referred to the incidents with the bin latch shrouds, the wing skin nick and the radome damage. Kinser did not report his belief that Miller asked him to sign off on an incomplete C-check until October of 2002 when an FAA investigation was taking place at the Cincinnati Maintenance Base. (Tr. 346). The record contains an inconsistency between Kinser's current testimony and that given in a previous deposition. In the deposition, he stated that Miller asked him

to sign off on the C-check, not whether he was "comfortable" signing off on the C-check. (Tr. 329-31).

Miller testified that he merely asked Kinser to sign off on the C-check for aircraft 535 and did not use the word "comfortable." (Tr. 800). He also recalled that he explained to Kinser that he need not be "cognizant of all the work performed, just that all the documentation was there and the signatures were there." (Tr. 800).

Kinser's testimony regarding what was requested of him on April 10, 2002 in connection with the aircraft 535 C-check is inconsistent. Initially, he testified that he was uncomfortable signing off on the C-check because he was unfamiliar with the work that had been performed on aircraft 535. Later in his testimony, he stated that he was uncomfortable because he believed Miller was asking him to sign off on an incomplete C-check in violation of the FAA regulations. Kinser's own written statement of April 16, 2002 and Boeh's written statement of April 12, 2002, reflect that Kinser declined to sign off on the C-check because he had not personally performed much of the work on that aircraft. (JX 15, 16). Kinser's initial testimony is supported by his earlier written statements. His later representations concerning FAA regulation violations appear to be fabrications designed to enhance the worthiness of the complaint here.

On the morning of April 11, 2002, Richard Hatcher, the Director of Heavy Maintenance for Mesaba, informed Baker that a maintenance supervisor has signed off on a C-check rather than an inspector or other quality control personnel. Baker perceived this as a problem because the quality control department was responsible for signing off C-checks and not the maintenance department. (Tr. 657). In response to this information from Hatcher, Baker e-mailed Miller to request that they speak about this occurrence on April 10, 2002. (JX 13).

Baker and Miller spoke over the phone on April 12, 2002. (Tr. 659). Miller explained that Kinser had refused to sign off on the C-check because he was unfamiliar with the work performed on that C-check. Therefore, in order to finalize the C-check and release the aircraft for service an authorized member of the maintenance department signed off on the aircraft. Baker requested that Miller gather facts regarding this incident and report back to him. Miller e-mailed Baker that same day detailing the sequence of events. Again, Miller stated that Kinser explained that he "didn't feel comfortable signing off on

a C-check that he wasn't directly involved in." (JX 14). Also on April 12, 2002, Boeh submitted a statement via e-mail relating his version of the events. Boeh stated that when he asked Kinser whether he was going to sign off on the C-check, that Kinser replied, "I haven't worked on that aircraft and I don't really feel comfortable signing for an aircraft that I had nothing to do with." (JX 15).

On April 16, 2002, Kinser sent an e-mail to Miller explaining his reason for not signing off on the C-check on April 10. (JX 16). Kinser stated,

> I did…not feel comfortable signing off the C check and Airworthiness Release on 535 because I could not certify that the work was performed in accordance with the GMM or that all Required Inspection Items were properly inspected, due to the fact that my only involvement in the check was one sheet metal repair.

(JX 16). Miller forwarded Kinser's statement to Baker on the date it was received. (JX 17). He commented that Kinser seemed to misunderstand the procedures and purpose of signing off a C-check and questioned whether Kinser should be "written up."

On April 25, 2002, Baker replied to Miller regarding Kinser's explanation for not signing off the C-check for aircraft 535. (JX 17). Baker questioned whether Kinser's statement implied that he may have believed that something was wrong with the aircraft. Were that the case, Baker explained to Miller that by not reporting such concerns, Kinser violated the Federal Aviation Regulations. Baker testified that Kinser

> had not complied with his work instructions, or had not released the aircraft in accordance with his inspection duties. The GMM identifies procedures that are to be followed that allows an aircraft to be released, and he did not follow those procedures.

(Tr. 661).

Section 3.1 of Mesaba's GMM details the procedures required for signing off a C-check. (JX 21). An inspector must "determine that all items have been completed and properly

signed by the person…that performed the work." It is further explained that the inspector performs this review by "verification that all required signatures are present" on the MM-08. Baker testified that "the amount of work that an inspector does on a C-check has no importance to the performance of a C-check sign off." (Tr. 666). He further explained that it would be difficult to finalize a C-check if the inspector signing off was required to have significant involvement in the performance of the C-check as a whole. As the C-check can take two to six weeks to complete, many different mechanics and inspectors would work on the same aircraft during that time period, thus "no one person or series of persons could be responsible for all aspects" of the work. (Tr. 666). Thus, in signing off the aircraft, the inspector or quality control representative is ensuring that all signatures are present on the MM-08 and that all MM-409s are physically present and the inspector is not responsible for all the work that those forms represent. (Tr. 667).

Therefore, the GMM did not require Kinser to have substantial involvement with the work performed during the C-check on aircraft 535 in order to sign off on it. What was required of Kinser was to review the MM-08 and see that all required signatures were present and to check that each MM-409 referenced in the MM-08 was physically present. If Kinser refused to sign off on the C-check because he believed there was something wrong with the aircraft, he needed to report that information. However, if Kinser's refusal was only because he did not have significant involvement with the C-check on aircraft 535, his refusal was erroneous and contrary to stated policy.

On April 28, 2002, Miller issued a memorandum to all quality control personnel at the Cincinnati Maintenance Base. (CX 30). Miller directed that all quality control personnel were to adhere to the same policies and procedures as the maintenance department. Miller explained in the memorandum that these steps were in response to increased scrutiny of the department. Quality control personnel were to record time spent for lunch, obtain prior approval for overtime and vacation, and sick days were to be reported to the quality control manager only.

Kinser testified that prior to this memorandum the policies in the quality control department were "very liberal" and that the employees acted professionally and did not abuse the situation. (Tr. 106). Kinser believed that the memorandum was

directed at him because he was taking more sick time due to the increased tension between him and Miller. (Tr. 109). Kinser felt this memorandum was in retaliation for his report to Anderson in March 2002 as Miller would have been aware of Anderson's investigation by this time.

Miller testified that the April 28, 2002 memorandum was necessary due to complaints from maintenance personnel and Miller's superiors. (Tr. 832). Miller stated that this clarification of policies was not motivated in any part by Kinser's actions.

Kinser was disciplined for the April 10, 2002 refusal to sign off the C-check for aircraft 535. On May 15, 2002, Miller presented Kinser with a "coaching letter." (JX 22). Baker testified that he drafted the letter in its final form. (Tr. 672). The letter stated that Kinser's refusal to sign off on the C-check was improper and explained that an inspector need not have significant involvement in the C-check process in order to sign off for release to service. The letter outlined the procedure Kinser was to follow. In addition, Baker informed Kinser that his reasoning for refusal, that he was uncomfortable signing off the C-check, was an invalid reason. He explained that his refusal should have been accompanied by "specific references" to tasks with which he was uncomfortable. Baker cautioned that if Kinser's refusal was based on a belief that the aircraft was not airworthy, that he had a duty to inform management. Baker concluded by stating that Kinser's refusal was a violation of company policy and a violation of the GMM procedures. The letter was to remain in Kinser's personnel file for one year and warned that further infractions would result in disciplinary action.

When Miller presented Kinser with the coaching letter, Kinser told Miller that he did not agree with the manner in which his actions were portrayed. (Tr. 120). Kinser testified that Miller "never asked me that night if I would sign off the C-check after reviewing the documents or he never told me to sign off the C-check." (Tr. 120). Kinser was surprised by the coaching letter as nothing had been said to him about the incident since he submitted his statement on April 16, 2002. Kinser testified that it was not his understanding that a document review was all that the GMM required to sign off on a C-check. However, Kinser explained, "if that's…the way [Miller] wanted things to work, he was my manager and that's the way I was going to do it." (Tr. 121).

In addition to the coaching letter, Kinser was provided a copy of his performance appraisal on May 15, 2002. (JX 35). The appraisal was completed by Miller and highlighted shortcomings and successes in Kinser's employment. Miller reported that Kinser was knowledgeable about his job and safety. He found Kinser's quality of work to be "adequate" and stated that Kinser worked well with others. However, Miller reported that "on certain issues, employee has refused to accomplish assigned tasks." (JX 35). Miller testified that in this statement he was referring to Kinser's refusal to sign off on the aircraft 535 C-check. (Tr. 858). Furthermore, Miller noted that he received complaints that Kinser could not be found at times when needed by co-workers and that Kinser had missed a lot of work. (JX 35). Miller recommended that Kinser be more "flexible" regarding his work, to communicate more with management, and to maintain reliable attendance. Miller also commented that Kinser had shown a "propensity for affecting other employees production through what appears to be lack of respect for superiors and procedures." (JX 35). Kinser signed the performance appraisal, but he and Miller did not discuss it. (Tr. 123).

July 2002 C-check

On July 2, 2002, the C-check of aircraft 513 was near completion. The aircraft was due for service at 7:35 a.m. July 3, 2002. (JX 32). Wesley P. George was working the day shift on July 2 and continued to work after the end of his shift to try and finish the C-check. George was still working on the C-check when Kinser arrived for his shift at 11:30 p.m. that night. At that time there were several discrepancies which had yet to be rectified, including work that required the attention of an avionics technician. (Tr. 134-35). When Kinser arrived, George asked him, "what's it going to take to get you to sign a C-check off?" (Tr. 894). (Tr. 131). George testified that he asked this in a joking manner and then proceeded to inform Kinser what maintenance remained to be performed on the aircraft. Kinser testified that he replied that he would not sign off on the C-check as the required work was not yet finished. George remembered that Kinser stated that he could not sign off the C-check because "the GMM said that he would have to actually witness everything that was done before he could sign it off." (Tr. 894). George explained that Kinser would only need to check for signatures and that all MM-409s were accounted for. Kinser again refused to sign off on the C-check. Due to Kinser's refusal, George continued working to

help finish the work still required for the C-check. Kinser also assisted in working to complete the C-check. (Tr. 135).

The record reveals that Kinser has given inconsistent accounts of this conversation with George. Kinser testified that he did not believe that George was asking him to sign off on aircraft 513 immediately without the maintenance or paperwork being complete. (Tr. 355). However, at a grievance hearing on July 26, 2002, Kinser stated that he believed George had asked him to sign off on the C-check prior to its completion. (Tr. 697). In a prior deposition, Kinser explained that he told George that he would not sign off on the aircraft because he was unfamiliar with the work performed. (Tr. 357). Before this court, Kinser did not recall this part of the conversation. In addition, Kinser testified that when George asked what it would take for him to sign off on the C-check that Kinser believed him to be asking a general question and not about aircraft 513. (Tr. 359-61).

George stayed at work until 4:00 a.m., when it became apparent to George that aircraft 513 would not be ready for service at the appointed time. (Tr. 896). George attempted to telephone Terry Holman, another inspector due in on July 3 for the day shift, to see if he could come in earlier to work on the C-check. George was unable to get a hold of Holman and asked Kinser to try Holman later. Kinser also tried to telephone Holman, but did not reach him. (Tr. 136). Kinser remembered that the avionics technician arrived around 6:00 or 7:00 a.m. Kinser inspected the maintenance after it was finished.

On July 3, 2002, Holman arrived for work at 7:30 a.m. (Tr. 571). Long, the C-check supervisor, sought out Holman and told him that he was needed to release aircraft 513 immediately. Holman and another inspector reviewed the paperwork and signed off on the C-check. The procedure took approximately 15 to 20 minutes. Holman did not have a chance to speak with Kinser before Kinser left at the end of his shift at 8:00 a.m. (Tr. 573). Holman testified that he found it strange that Kinser did not sign off on the aircraft.

Within a few days of July 2, 2002, George wrote a statement regarding the events of that night. (JX 23). George testified that he wrote the statement voluntarily with no request to do so in order that the events surrounding the release of aircraft 513 would not be repeated. (Tr. 894). George stated, "I wrote this so we could at least get it straightened out. …I wasn't aware if he knew about the GMM, what it said, but maybe we could get

him…to look at it, so I…wouldn't have to go through this again." (Tr. 894). The statement reflects George's memory of the events and his wish to avoid a recurrence. (JX 23). At the request of Miller, Holman also submitted a statement about the events of the morning of July 3, 2002. (JX 24). Holman's statement is consistent with his testimony.

Miller telephoned Baker shortly after the July 2, 2002 incident. (Tr. 674). Miller informed Baker that Kinser had not felt comfortable signing off on the C-check for aircraft 513 on that date. Baker also received the statements from George and Holman. Baker's understanding of the events was that Kinser was asked if he would sign off on the C-check for aircraft 513 when it was completed and that Kinser refused to do so and would continue to refuse to do so because he was unfamiliar with the work that had been performed on that aircraft. (Tr. 679).

Baker determined that a four-day suspension without pay was an appropriate consequence to Kinser's action. (Tr. 688). As the May 14, 2002 coaching letter addressed the same circumstances, Baker believed more severe discipline was necessary. On July 10, 2002, Baker sent an e-mail to Scott Bussell, Vice President at Mesaba, to inform him of his intentions to suspend Kinser. (JX 25).

Baker authored the final disciplinary letter given to Kinser informing him of his four-day suspension without pay, although Miller had written several earlier drafts. (Tr. 688). Miller presented Kinser with the disciplinary letter on July 18, 2002. (JX 29). The letter stated that Kinser again refused to sign off an aircraft because he was unfamiliar with the work performed and that this was a "direct violation of established GMM procedures." The letter referenced the May 15 coaching letter. Kinser's suspension was to take place immediately. Finally, Baker cautioned that further infractions would result in disciplinary action that could include termination.

Kinser signed the disciplinary letter but did not discuss it with Miller at the time. (Tr. 140-41). When Kinser returned home, he telephoned James J. Schafer, his union representative, to ask his advice. Schafer told Kinser to write a statement reflecting his account of the events.

Kinser wrote the statement on July 18, 2002. (JX 38). The statement reads, in part:

> I never said that I would not sign the 'C' check off. I did say that it probably wasn't going to be ready by the time I left, because the mechanics working on it were running into a lot of problems. In fact, it didn't leave until well after I had gone for the day. On several instances after 2:00 a.m. I asked Wes what he was still doing there. It was apparent by that time that the plane wasn't going to be ready. The forward vestibule was still being installed. Wes never relayed to me that his decision to stay was due to our discussion, nor did he inform me of his decision to stay at all.

(JX 38).

Kinser asked for a grievance hearing regarding his four-day suspension. (Tr. 160). The effect of a grievance hearing was to suspend the reduction of pay for the four-day suspension until a decision was reached from the facts gathered from the hearing.

The hearing took place on July 26, 2002. (Tr. 492). In attendance were Kinser, Schafer, Miller, Baker, George, and John DeVore, the avionics technician who had been called in on July 3, 2002 to work on a discrepancy on aircraft 513. (Tr. 161, 165; JX 33).

At the grievance hearing, Kinser testified that he refused to sign off on the C-check because he was being asked to do so before the work on the aircraft was completed. (Tr. 697). George testified that in his request for Kinser to sign off the C-check he meant for Kinser to sign it off when all the work was complete. (Tr. 698). Baker witnessed George's agitation at Kinser's testimony, "Mr. George was physically upset that Jaison would even insinuate that Wes [George] had asked him to sign the aircraft off before it was ready. He was physically shaken, he was red-faced and very tense." (Tr. 698).

Schafer argued at the grievance hearing that it was inappropriate for Mesaba to increase the punishment from a coaching letter to a four-day suspension without pay. (Tr. 162). In addition, Schafer argued that "the whole precept of the hearing was moot because the aircraft was never ready to go when [Kinser] was on [his] shift that night." (Tr. 162).

The record is consistent in showing that aircraft 513 was not able to be released for service for its 7:35 a.m. departure on July 3, 2002. (JX 32). Kinser testified that the flight log inquiry for July 3 shows that another aircraft was substituted for aircraft 513 for the morning departure. (Tr. 163, JX 32). In addition, Kinser explained that the flight log inquiry demonstrates that aircraft 513 did not leave the hangar until 1:50 p.m. on July 3, 2002.

The record is unclear; however, as to exactly what time aircraft 513 was complete in order for the C-check to be finalized. George testified that the work was incomplete when he left work at 4:00 a.m. DeVore, the avionics technician, arrived between 6:00 and 7:00 a.m. to work on the discrepancy detailed by the MM-409. Holman testified that the work on aircraft 513 was complete when he arrived at 7:30 a.m. on July 3 and that he and another inspector reviewed the paperwork and signed off on the C-check. (Tr. 586). By Holman's testimony, the required work on the aircraft was complete by 7:30 a.m. on July 3. Kinser's shift ended at 8:00 a.m. Kinser testified that the work was not complete on aircraft 513 prior to his shift ending, but he did not state what time the work was complete. Kinser also stated that DeVore testified at the grievance hearing that aircraft 513 was not ready to be signed off when Kinser left at 8:00 a.m.; however, there is no other evidence in the record to substantiate Kinser's account of DeVore's alleged statement. (Tr. 166). Kinser's testimony regarding the departure time of the aircraft does not reveal at what time the C-check was able to be signed off. Baker e-mailed Miller several days after the grievance hearing. (JX 31). Baker questioned the manner in which the circumstances leading up to the hearing were investigated and commented to Miller that "it seems you neglected to identify that the [aircraft] didn't get released for another dozen hours anyway." However, the actual time the aircraft was ready for release is not mentioned. Holman is the only witness with first-hand knowledge of the time when the C-check was completed and ready for release.

Kinser was never informed of any resolution or decision reached as a result of the grievance hearing. (Tr. 167). Kinser's pay was never reduced for the four-day suspension. Baker had decided not to dock Kinser's pay for the suspension as he "didn't want to further antagonize the working relationship of the Cincinnati maintenance inspection base." (Tr. 699).

August 2002

On August 2, 2002, Miller had a conversation with Tom Hatton, a mechanic, about Kinser. (Tr. 834). Hatton had been working on an aircraft elevator with Kinser and other employees. The work was not finished when Kinser's shift ended at 8:00 a.m. and Kinser punched out at 8:00 a.m. Hatton came to Miller after Kinser left to ask who was going to be the inspector for the work as Kinser had left.

Miller sent an e-mail to Kinser on August 2 asking why he did not stay to finish the job, or alternatively, why he did not inform Miller or anyone that there was going to be a need for an inspector on that job. (CX 31). Miller requested that Kinser submit a statement in answer to his questions. Kinser did not respond to the statement personally, but responded through Schafer. Schafer sent an e-mail to Miller stating that he and Kinser were willing to assist Miller in any way with his questions, but that it would be better to do so in person and with union representation in attendance. (CX 7).

Kinser filed his whistleblower complaint under AIR 21 with Department of Labor on August 13, 2002. He filed the complaint due to "the problems that [he] was having addressing the issues. I thought I had taken appropriate measures through Mesaba's management to address the issues, and each time there was no response to [him] or an unsatisfactory response." (Tr. 167).

Furlough

On September 19, 2002, Kinser received a notice of reduction in force informing him that at the end of his shift on October 1, 2002, he would be "furloughed from his current classification." (CX 21). The letter informed Kinser that depending on the level of his seniority, he may be able to displace a less senior employee and fill a lower position.

Kinser considered the furlough to be retaliatory and contacted Schafer as soon as he received the letter. (Tr. 169). After speaking with Schafer, Kinser completed a System Displacement Form to request that he displace a more junior employee. (CX 22). Kinser elected to return to a mechanic position. Kinser completed the form on September 21, 2002, and gave a copy to Miller, Schafer and the local union representative. (Tr. 171-72).

Kinser was given a position as a mechanic, but was not told where to report on the first day of furlough or when. (Tr. 172). At the end of his shift on October 1, 2002, Kinser asked all of the present supervisors whether he was supposed to report to work that day. (Tr. 177). No one was able to tell Kinser where or when he was supposed to report.

On October 2, 2002, Kinser arrived at the maintenance base at 11:30 p.m. to find a note allegedly from Richard Hatcher, the Director of Heavy Maintenance, which told him to report for work the morning of October 3, 2002.

On October 4, 2002, Kinser received a letter from Kelli Lucas, Benefits Administrator at Mesaba, informing him that he was to report to Long to arrange his work schedule as a mechanic. (CX 29). However, on October 4, Kinser was out of town fulfilling his National Guard duty. (Tr. 179). The letter was dated October 2, 2002.

Management at Mesaba perceived that Kinser had failed to show up for work and held a hearing on the issue. (Tr. 179). No action was taken due to the lack of communication regarding Kinser's work assignment.

At Mesaba, inspectors earned $1.15 per hour more than mechanics. In addition, a mechanic who possessed RII authorization earned $.50 more per hour than a mechanic without the authorization. When Kinser returned to a position as a mechanic after he was furloughed, he lost inspector pay. However, Kinser did possess RII authorization and would have been entitled to the additional $.50 per hour. On October 3, 2002, Miller informed Kinser that he was rescinding his RII authorization as of October 1, 2002. (CX 9). At the time, Miller provided no explanation for the rescission. Miller testified that he rescinded the authorization because Kinser had "already proved reluctant to use his RII and inspection authority as a full-blown inspector. I didn't expect him to all of a sudden become a lot more amenable to using it when he was not an inspector." (Tr. 814).

In mid-October, an inspector position opened up in the Quality Control Department. Miller approached Kinser and informed him of the position and inquired whether or not he would be interested in the position. (Tr. 824). Miller testified that Kinser replied that he was unsure, but that he would let Miller know. In the meantime, Miller asked other employees whether they would be interested in the inspector

position, but informed them that Kinser had seniority rights for that position. (Tr. 825). Kinser accepted the position on October 21, 2002, and began working as an inspector on October 28, 2002. (CX 23, Tr. 218, 220). However, Kinser did not maintain this position for very long as he resigned on November 1, 2002 to accept a position with another company. (CX 24; Tr. 220).

Working Environment at Cincinnati Maintenance Base

Many of the witnesses testified to a tense working environment at the Cincinnati Maintenance Base. Schafer testified that Richard Hatcher, Director of Heavy Maintenance,

> Frequently told all of the employees of the Cincinnati Maintenance Base that if they didn't work hard, if they didn't get the aircraft out in time…that they would have to close the maintenance base and they would all be out of jobs.

(Tr. 531). Furthermore, company-wide furloughs were occurring approximately every six months after the events of September 11, 2001. (Tr. 548).

Holman testified that there was a tension between the union employees at the Cincinnati Maintenance Base and Miller. (Tr. 582). He believed that Miller had not been communicating with the inspectors. In addition, Holman stated, "We didn't feel he was doing his job…as a supervisor, and…I think he's feeling like he wasn't in control." (Tr. 576-77). Holman believed Miller was not an involved manager,

> [Miller] had no idea what was going on with his inspection department. He was pretty much just there day in and day out to collect the paycheck…we self-managed ourselves, and he's lucky he had a good team to do that because…I think we're all pretty dedicated individuals and did our work. He wasn't much part of the process.

(Tr. 614-15).

Perry relinquished his RII designation so that he would no longer have to work for Miller. (Tr. 465). He felt "uncomfortable" working for Miller.

Baker attributed the working atmosphere at the Cincinnati base to be due to "a lack of a permanent maintenance manager" there. (Tr. 775). Baker reasoned that there was tension at the base due to the large volume of work and the newly hired staff. He explained that the "learning curve was very steep" for those newly hired at the Cincinnati base. Mesaba was acquiring additional aircraft, which increased the volume of maintenance and inspections. Newly-hired employees "had to learn at an accelerated pace, because airplanes were waiting to come in after that one is done. Because by the regulations, the inspection has to be done by a certain time frame or else the aircraft can't fly." (Tr. 775).

Schafer had been contacted by several mechanics and inspectors regarding the working environment in Cincinnati. (Tr. 480). He stated,

> People were really concerned about the fact that there was basically an atmosphere down there that was very dangerous in regards to aircraft maintenance. They weren't allowed to go ahead and write up items on aircraft, unless they had gotten it cleared by either a manager first or something along those lines."

(Tr. 480). Schafer testified that others had contacted him claiming discriminatory treatment in retaliation for writing up discrepancies. (Tr. 526). It was his understanding that managers would review MM-409s and decide whether the mechanic or inspector should write up that discrepancy. Retaliation was expressed by:

> mak[ing] your life miserable, question everything that you do, watch everything that you do. If you called in sick, they would demand to have a doctor's note, which in accordance with the contract, they had the right to…do that, but other employees that would call in sick, were not required to go ahead and produce doctor's notes. Their time cards were scrutinized to make sure that they punched out exactly the same time they were supposed to…They were not all being treated equally.

(Tr. 526).

Kinser's Work Performance

The record contains varied accounts of Kinser's work performance at Mesaba. Kinser testified that he was a person to whom other employees would come with their concerns about Miller's management. (Tr. 222).

Miller opined that Kinser was difficult to work with and that he "bait[ed]" other employees. (Tr. 797). Miller testified that inspectors and mechanics complained to him that Kinser could not be found when needed and reported that he was sleeping during work. In addition, Kinser allegedly left the premises on one occasion without informing anyone he was leaving. Miller believed that Kinser's attitude affected those with whom he worked,

> He was in fact affecting other employees' production and affecting the morale of the other inspectors by making statements such as, I didn't come into QC to have to work for a living, or, you know, I'm going to write a bunch of stuff up that ought to really throw a kink into their program. Or…telling people that he was going to refuse to do a job because he couldn't find anything that said he had to.

(Tr. 819).

Armstrong testified that Miller mentioned to him that Kinser was performing below expectations. (Tr. 242). At the time, Armstrong, Miller and Kinser were new in their respective positions and Armstrong believed the situation would resolve over time. Armstrong also remembered that Miller said that Kinser was not a "team player." (Tr. 244).

Three of Kinser's former co-workers gave their impressions of Kinser's work performance. Perry testified that Kinser was very thorough in his work and knowledgeable about his job. (Tr. 463). George felt that "[t]here were some times when Jaison could have been out on the floor a little more." (Tr. 889). There were times when George had to send someone to find Kinser. Holman testified that he reported to Miller on a few instances that Kinser had disappointed him in work performance. (Tr. 565). For example, Holman recounted an event in July or August

2001 in which Kinser left at the end of a shift without finishing what he was working on or updating Holman about the status of the aircraft undergoing a check. However, Holman found Kinser to be "smart…as far as maintenance. He knows…what to look for." (Tr. 564). He believed Kinser to be a "really dedicated employee or hard worker." (Tr. 565).

Working Relationship between Kinser and Miller

The record reveals that Kinser and Miller did not have an amiable working relationship. Perry stated, "I heard…Mr. Miller make comments about Jaison several times, and it was known there was no love loss there between the two. It was kind of well known." (Tr. 464). Perry explained, "there was feud going on pertaining to some paperwork incident that happened…it was a well-known fact that Dan and Jaison had a conflict of personality or something." (Tr. 464).

Holman believed there was tension between the inspection department and Miller. (Tr. 577, 582). He did not observe that Miller "picked on" Kinser specifically, as he felt that such treatment by Miller was department-wide. (Tr. 575).

When Armstrong visited the Cincinnati Maintenance Base to speak with Kinser and Miller regarding the bin latch shroud incidents, he advised Miller that Kinser could not be disciplined for writing up the latch shrouds, but that Kinser could be moved to the night shift. Armstrong testified that there was a "personality conflict" between Kinser and Miller and believed that moving Kinser to the night shift and out of direct daily contact with Miller would ease the situation. (Tr. 242).

Kinser and Miller were suspicious of each other. Miller testified that he wanted his actions involving Kinser to be documented in writing so that Kinser could not misconstrue his statements. (Tr. 834). Miller stated regarding a August 2, 2002 e-mail,

> By this time it was already common knowledge that Jaison was scrutinizing everything that was being told to him by me or anyone else in management, and I didn't want to take a chance that the facts of what I had actually said would be misrepresented, and because they had already been misrepresented in the past.

(Tr. 834).

Kinser testified that Schafer informed him that Miller had intentions of terminating him in August of 2001. (Tr. 337). Therefore, from then on Kinser saw Miller's actions as an effort to "find anything he could to build a case against [him] to get [him] fired from Mesaba." (Tr. 144). After August 2002, Kinser consulted Schafer about his interactions with Miller. (Tr. 205). Kinser no longer responded personally to Miller's requests, but had Schafer contact Miller. Kinser feared that without Schafer's involvement that Miller would terminate him.

CONCLUSIONS OF LAW

Since Complainant's employment was within the state of Kentucky, this case is controlled by the law of the Sixth Federal Circuit.

The employee protection provisions of AIR 21 are set forth at 49 U.S.C. §42121. Subsection (a) proscribes discrimination against employees of air carriers or contractors or subcontractors of air carriers who provide information to the employer or the Federal Government relating to a violation of laws pertaining to air carrier safety. 49 U.S.C. §42121(a) (2002).

In addition, the statute sets out the burdens of proof in 49 U.S.C. §42121(b)(2)(B):

> (i) The Secretary of Labor shall dismiss a complaint…and shall not conduct an investigation otherwise required…unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action.
>
> (ii) Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable

personnel action in the absence of that behavior.

(iii) The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

49 U.S.C. §42121(b)(2)(B) (2002).

The burden of proof standard in the whistleblower protection provisions of AIR 21 is the same as that of the Energy Reorganization Act (ERA). The ERA burden of proof standard was amended in 1992 and it is that standard that appears in AIR 21. The two leading cases applying the post-1992 ERA amendments are *Trimmer v. U.S. Department of Labor*, 174 F.3d 1098 (10th Cir. 1999) and *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568 (11th Cir. 1997). In *Trimmer* and *Stone & Webster*, the burdens of proof appear to be interpreted and applied in the same fashion. The proof burdens as stated in *Trimmer* are as follows:

> The Energy Reorganization Act of 1974 (ERA) prohibits any employer from discharging or otherwise discriminating against any employee "with respect to his compensation, terms, conditions, or privileges of employment" because the employee engaged in protected whistleblowing activity. 42 U.S.C. §5851(a). In 1992 Congress amended §5851 of the ERA to include a burden-shifting framework distinct from the Title VII employment-discrimination burden-shifting framework first established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See* Energy Policy Act of 1992,

Pub.L. No. 102-486, § 2902(d), 106 Stat. 2776, 3123-24 (amending 42 U.S.C. § 5851(b)). Although Congress desired to make it easier for whistleblowers to prevail in their discrimination suits, it was also concerned with stemming frivolous complaints. Consequently, § 5851 contains a gatekeeping function, which provides that the Secretary cannot investigate a complaint unless the complainant has established a prima facie case that his protected behavior was a contributing factor in the unfavorable personnel action alleged in the complaint. *See* § 5851(b)(3)(A). Even if the employee has established a prima facie case, the Secretary cannot investigate the complaint if the employer can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. *See* § 5851(b)(3)(B). Thus, only if the employee establishes a prima facie case and the employer fails to disprove the allegation of discrimination by clear and convincing evidence may the Secretary even investigate the complaint.

If, as here, the case proceeds to a hearing before the Secretary, the complainant must prove the same elements as in the prima facie case, but this time must prove by a preponderance of the evidence that he engaged in protected activity which was a contributing factor in an unfavorable personnel decision. *See* § 5851(b)(3)(C); *see also Dysert v. Secretary of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997)(holding that Secretary's construction of § 5851(b)(3)(C), making complainant's burden preponderance of the evidence, was reasonable). Only if the complainant meets his burden does the burden then shift to the employer to demonstrate by clear and convincing evidence that it would have taken

> the same unfavorable personnel action in the absence of such behavior. *See* § 5851(b)(3)(D).

Trimmer, 174 F.3d at 1101-02.

Recently, the Administrative Review Board (ARB) addressed the burdens of proof in ERA cases. *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003). The ARB's holding in *Kester* is consistent with those in *Trimmer* and *Stone & Webster*. The ARB held that a complainant must demonstrate by a preponderance of the evidence that he or she engaged in a protected activity, that the employer was aware of the protected activity, that the complainant was subject to an adverse employment action, and that complainant's protected activity was a contributing factor in the adverse employment action. *Id.* If the complainant meets this burden, then the employer must demonstrate by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected activity. *Id.*

In this case, I shall apply the evidentiary framework as prescribed in 49 U.S.C. §42121(b)(2)(B) and as interpreted by *Trimmer*, *Stone & Webster*, and *Kester*. Therefore, Complainant has the initial burden to prove by a preponderance of the evidence that: (1) he engaged in protected conduct; (2) Respondent was aware of that conduct; (3) Complainant suffered an adverse employment action; and (4) that his protected activity was a contributing factor in the unfavorable personnel decision. 49 U.S.C. §42121(b)(2)(B) (2002); *Trimmer*, 174 F.3d at 1101-02; *Stone & Webster*, 115 F.3d at 1572; *Kester*, 2000-ERA-31 at 3. If Complainant proves his burden by a preponderance, then Respondent can avoid liability if it can prove by clear and convincing evidence that it would have taken the same adverse employment action in the absence of Complainant's protected activity. 49 U.S.C. §42121(b)(2)(B) (2002).

Timeliness

An AIR 21 whistleblower complaint alleging discrimination in violation of the Act must be filed within 90 days after the violation of the Act occurred. 49 U.S.C. § 42121(b)(1)(2002); 29 C.F.R. § 1979.103(d) (2003). The 90-day limitation period begins to toll "when the discriminatory decision has been both made and communicated to the complainant." 29 C.F.R. § 1979.103(d) (2003); *Trechak v. American Airlines, Inc.*, 2003-AIR-5 (ALJ Aug. 8, 2003).

By limiting the period in which a complaint may be filed in employment discrimination claims, Congress "intended to encourage the prompt processing of all charges of employment discrimination." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980). The Supreme Court has held, "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.* at 826. Therefore, instances of discrimination falling outside the statutory period are no longer actionable, barring an applicable exception. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002).

The continuing violations doctrine, if applicable, permits a complainant to include discriminatory actions that fall outside the limitations period. *Burzynski v. Cohen*, 264 F.3d 611 (6th Cir. 2001). In a recent case, the United States Supreme Court limited the application of the continuing violations doctrine. *Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). In *Morgan*, the Supreme Court applied the continuing violations doctrine to a racial discrimination complaint brought under Title VII. The plaintiff in that case alleged three types of discrimination: discrete, retaliatory, and hostile work environment. *Id.* at 2069. The Court determined discrete and retaliatory discrimination to be similar in that each occurs on a specific date. *Id.* at 2071. In contrast, hostile work environment discrimination by its "very nature involves repeated conduct" and can take place over a series of days or years. *Id.* at 2073. In addition, the Court explained that the separate instances comprising the hostile work environment claim may not be actionable individually. *Id.* Regarding application of the continuing violations doctrine, the Court held,

> Discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred. The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete

> acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed.

Id. at 2072.

Therefore, in *Morgan*, the Court determined that the continuing violations doctrine could not apply to include discrete or retaliatory acts of discrimination that occurred outside the Title VII statutory limitations period. *Morgan*, 122 S.Ct. at 2077. In contrast, the Court concluded that a hostile work environment claim would not be time barred "so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." *Id.*

The Sixth Federal Circuit recently addressed *Morgan* in *Sharpe v. Cureton*, 319 F.3d 259 (6th Cir. 2003). Sharpe involved an employment discrimination claim brought under 42 U.S.C. §1983, the Civil Rights Act of 1871. *Id.* at 260. The Court found that the holding in *Morgan* should not be restricted only to Title VII claims and applied the holding to the §1983 claim. *Id.* at 267.

Morgan has been applied in other AIR 21 cases. In *Ford v. Northwest Airlines, Inc.*, 2002-AIR-21 (ALJ Oct. 18, 2002), the *Morgan* rationale was applied to bar alleged discriminatory acts falling outside the limitations period. *Id.* at 7. It was held that the complainant had not presented evidence of a hostile work environment; therefore, the continuing violations doctrine did not apply. In *Trechak v. American Airlines, Inc.*, 2003-AIR-5 at 7 (ALJ Aug. 8, 2003), the administrative law judge likewise applied the holding in *Morgan* to find the complainant's action to be time-barred.

Complainant argues that the continuing violations doctrine should be applied to his claim so that acts occurring outside the 90-day limitations period may be included. Complainant contends that the adverse employment actions formed a pattern of discrimination beginning in July 2001 and continuing until he resigned on November 1, 2002.

Respondent argues that the adverse employment actions occurring prior to May 15, 2002 are discrete acts and therefore the continuing violations doctrine is inapplicable.

Kinser filed his complaint on August 13, 2002. Therefore, alleged discriminatory actions occurring between May 15, 2002 and August 13, 2002 are within the 90-day limitations period and are actionable. Actions falling outside of that time period are barred, unless an exception is applicable.

Complainant has alleged two discriminatory actions that took place during the 90-day limitations period. First, he claims that the "coaching letter" which he received on May 15, 2002 regarding his refusal to sign off on the April 10, 2002 C-check is a retaliatory action. Second, he claims that the 4-day suspension effective July 18, 2002 for his refusal to sign off on the July 2, 2002 C-check is a retaliatory action. Both of these actions are within the limitations period.

In addition, Complainant seeks to include alleged discriminatory acts which occurred prior to May 15, 2002. Kinser seeks to include: (1) the transfer to the night shift in August 2001; (2) threats of termination; and (3) increased scrutiny of work by Miller.

On August 21, 2001, Mesaba informed Kinser that he would be switching to the night shift. This is a discrete incident that occurred on a certain date outside the 90-day limitation period from the filing date of the complaint. This action, even if discriminatory, is isolated and disconnected from other events, and is no longer actionable.

The record reveals that Miller directly threatened Kinser with termination on August 9, 2001. (JX 1). Again, this is a discrete incident that even if discriminatory, related to the events surrounding the latch shrouds which also are isolated and disconnected from events of May through August of 2002. Therefore, that item is also no longer actionable as it occurred outside the limitation period.

Kinser testified that Schafer informed him that Miller wanted to terminate him and that his work would be under scrutiny. (Tr. 446). Complainant contends that Miller's scrutiny of his work constitutes an adverse employment action. He does not contend that he suffered a hostile work environment. Complainant and Miller both worked the day shift from April of 2001 until August of 2001 when Kinser was transferred to the night shift. Thereafter, Kinser and Miller had very little interaction. (Tr. 328). Kinser testified that because he believed Miller intended to terminate him that he "had to be extremely cautious and…was always second-guessing [his] work."

(Tr. 446). Aside from the incidents occurring in July and August 2001, Kinser describes no other instances of scrutiny other than in a very general way. The record contains no evidence of any specific discriminatory acts related to Miller's scrutiny of Kinser's work. I find the instances of Miller's scrutiny of Kinser's work to be discrete acts occurring in July and August of 2001. A claim based on these instances is no longer actionable as they occurred outside the statute of limitations.

Relevancy of Complainant's Conduct and Respondent's Alleged Retaliatory Action and Discipline Occurring Outside of the 90 day Limitation Period

Respondent contends that the events of August of 2001 are not relevant to the timely-filed portion of the claim. Respondent argues that there is no connection as the August, 2001 events involve Miller as the decision-maker and the May and July of 2002 events involve Baker as the decision-maker. Therefore, Respondent asserts that the August 2001 events are irrelevant and should not be considered.

I find Respondent's argument to be without merit. Although Baker may have been the ultimate decision-maker and author of the disciplinary letters, he sought Miller's advice and guidance on the matters involved. Miller was Kinser's immediate supervisor and Baker, who was located in Minneapolis, did not have direct interaction with Kinser at the Cincinnati Maintenance Base. The record contains several e-mails between Miller and Baker during July and August of 2002. In these communications, Miller is providing Baker with information regarding Kinser's attitude, work performance and comments received from Kinser's co-workers. In addition, Miller attached drafts of a disciplinary letter to one e-mail. (JX 26). After the July 26, 2002 grievance hearing, Baker sent an e-mail to Miller regarding his displeasure at the outcome of the hearing. (JX 31). Baker stated,

> Do me a favor, quit listening to rumors. If there had been a better job investigating this thing he wouldn't be able to wiggle. We now have to determine the best way to move forward, all because someone stated he wouldn't release the [aircraft]. Oh by the way, it seems you neglected to identify that

> the [aircraft] didn't get released for another dozen hours anyway.
>
> Get those statements, then maybe I can go to Scott. I have a real problem with this, as I trusted your judgement and it went south real damn quick.

(JX 31).

The evidence of record supports a finding that Baker consulted with Miller regarding the circumstances surrounding Kinser's discipline. Therefore, the events of August 2001, contribute to complete the picture of Miller and Kinser's working relationship and I find those events to be relevant to the timely-filed claim.

Post-Complaint Adverse Employment Actions

Complainant contends that he suffered retaliatory adverse employment actions in the months following the filing of his August 13, 2002 complaint. These alleged retaliatory actions include: (1) Complainant's October 1, 2002 furlough; (2) the rescission of Complainant's RII designation; and (3) the attempt to discipline Complainant for not reporting as a mechanic at the beginning of October 2002. Complainant did not amend his complaint to include these events and they were not investigated by OSHA. Respondent argues that as the complaint was never amended to include these events, Complainant is barred from including them in the claim.

An administrative law judge may decide an issue raised by express or implied consent and fairly, fully litigated on the merits even though that issue was not contained in the pleadings. 29 C.F.R. § 18.43(c) (2003); *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992). The record must show that the parties "understood the evidence to be aimed at the unpleaded issue." *Yellow Freight*, 954 F.2d at 358.

These alleged retaliatory actions took place in October of 2002, almost two months after the complaint was filed. The parties thoroughly explored these events at the hearing and the record contains documentary evidence regarding the events. Respondent took the opportunity to question its own witnesses and cross-examine Complainant's witnesses about these events. Respondent's questions to the witnesses about these events reveal an understanding that these events would be included in

the claim. By including these events, Complainant does not seek to introduce a new theory into this case. The parties fairly and fully litigated the issues arising from the events of October of 2002, and they will be treated as if Complainant had included them in his original complaint.

Protected Activity

AIR 21 prohibits employers from discriminating against employees who:

> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety…or any other law of the United States;
>
> (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety…or any other law of the United States;
>
> (3) testified or is about to testify in such a proceeding; or
>
> (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. §42121(a) (2002). *See also* 29 C.F.R. §1979.102(b) (2002).

Case law and secretarial decisions regarding similar whistleblowing statutes provide additional insight into what constitutes protected activity. An employee's acts must implicate safety definitively and specifically to be considered protected. *American Nuclear Resources v. Department of Labor*, 134 F.3d 1292 (6th Cir. 1998). Although the employee's allegation need not be ultimately substantiated, the employee must have a reasonable belief that his or her safety complaint

is valid. *Minard v. Nerco Delamar Co.*, 1992-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8; *Kesterson v. Y-12 Nuclear Weapons Plant*, 1995-CAA-12 (ARB Apr. 8, 1997); *Nathaniel v. Westinghouse Hanford Co.*, 1991-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9. The Secretary has held consistently that internal complaints are protected activity under the whistleblower provisions of the environmental statutes. *See, e.g.*, *Bassett v. Niagara Mohawk Power Corp.*, 1985-ERA-34 (Sec'y Sept. 28, 1993); *Helmstetter v. pacific Gas & Electric Co.*, 1991-TSC-1 (Sec'y Jan. 13, 1993); *Williams v. TIW Fabrication & Machining, Inc.*, 1988-SWD-3 (Sec'y June 24, 1992).

Complainant contends that he engaged in the following protected activities: (1) reporting the discrepancies in the overhead bin latch shrouds on MM-409s in July and August of 2001; (2) reporting Miller's actions regarding the tearing up and voiding of the MM-409s to Armstrong in August of 2001 and to Anderson in March of 2002; (3) reporting Miller and Long's actions regarding the MM-409s recording the wing skin nick and radome damage to Anderson in March of 2002; (4) his refusals to sign off on two separate C-checks on April 10, 2002 and July 2, 2002; and (5) the filing of his AIR 21 whistleblower complaint on August 13, 2002.

In July and August of 2001, Complainant reported damaged and missing bin latch shrouds in the course of his duty as an inspector. Respondent argues that these acts do not constitute protected activity as a broken or missing bin latch shroud does not implicate safety. Although the evidence of record suggests that a broken shroud or a missing shroud does not implicate a serious safety concern, I believe that Complainant was engaged in protected activity when he reported the damaged or missing bin latch shrouds.

As an inspector at Mesaba, Complainant performed a vital function in air carrier safety. In *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984), the Ninth Circuit addressed the difficulties a quality control inspector in the nuclear industry may face,

> At times, the inspector may come into conflict with his employer by identifying problems that might cause added expense and delay. If the NRC's regulatory scheme is to function effectively, inspectors must be free from the threat of retaliatory

> discharge for identifying safety and quality problems.

Mackowiak, 735 F.2d at 1163. The record demonstrates that while Miller found Kinser's reporting of the bin latch shrouds to be "merely cosmetic items," that Kinser was correct in reporting any discrepancies found. (Tr. 781). The FAA requires that air carriers maintain inspection personnel and specific inspection procedures. The Secretary has held that employees engaged in quality control functions are engaged in protected activity under the whistleblower provision of the Energy Reorganization Act. *Richter v. Baldwin Associates*, 1984-ERA-9 (Sec'y Mar. 12, 1986). Here, Kinser was performing his function as a quality control inspector in reporting the missing or broken bin latch shrouds. I find this activity to be protected.

I find Kinser's report of Miller's tearing up and voiding the MM-409s recording the latch shroud discrepancies to Armstrong in August 2001 and to Anderson in March of 2002 to also be protected activity. The record supports a finding that Kinser had a duty to report the latch shroud discrepancies and that Miller violated FAA regulations in seeking to destroy or disregard the MM-409s. Kinser reported these actions to two senior members of management. AIR21 specifically protects this type of action. The statute dictates that an employee who provides information to his or her employer or to the Federal Government "relating to any violation or alleged violation of any order, regulation or standard of the Federal Aviation Administration" or other Federal aviation law is engaged in protected activity. 49 U.S.C. §42121(a)(1) (2002).

In addition, I find Kinser's report to Anderson in March of 2002 about possible falsifications on the MM-409s describing the wing skin nick and the radome damage to be protected activity. As above, Kinser made this report to senior management. Although Anderson did not find that the MM-409s were falsified, a falsified MM-409 would be in violation of the FAA regulations. Thus, Kinser's report to Anderson would constitute providing his employer information relating to a violation of the FAA regulations and therefore protected activity under AIR21. 42 U.S.C. §42121(a)(1)(2002).

Kinser contends that his refusals to sign off on the April 10, 2002 and July 2, 2002 C-checks were protected activity. AIR21 does not specifically list a refusal as protected activity. 49 U.S.C. §42121(a) (2002). In contrast, Section 5851 of the Energy Reorganization Act lists a refusal to engage

in an unlawful act under the ERA to be protected activity. 42 U.S.C. § 5851(a)(1)(B) (2002).

However, prior to the inclusion of the refusal provision in the ERA, refusals to work were found to be protected activity under certain circumstances. For example,

> If management had requested Complainant to falsify a quality control document or violate quality control procedures his refusal would constitute protected activity. Such a refusal would be designed to protect the overall integrity of the applicable quality control and inspection procedures. As such it could be construed as the initial step in instituting proceedings under 42 U.S.C. §5851 of the ERA.

Durham v. Georgia Power Co., 1986-ERA-9 (ALJ Oct. 24, 1986) (*affirmed* Sec'y Feb. 18, 1987). Therefore, if Kinser's refusal was based on a reasonable belief that he was being asked to violate FAA regulations and quality control procedures by signing off on the C-check, his actions could represent instituting proceedings under AIR21.

As discussed in the Findings of Fact, I find that I cannot credit Kinser's testimony that he believed Miller was requesting that he sign off on an incomplete C-check. The record reveals inconsistencies in his accounting of the April 10, 2002 incident. His oral testimony at the hearing is in itself inconsistent, as are his accounts from written statements close in time to the incident.

However, I can credit Kinser's testimony that he refused to sign off on the aircraft 535 C-check because he was unfamiliar with the work performed. This testimony is supported by his written statement of April 16, 2002, Boeh's written statement of April 12, 2002, and Miller's recollection of the events. However, Kinser's refusal on this basis does not constitute protected activity. Such a refusal should be based on a belief that to comply with the request would violate FAA regulations or quality control procedures. *Durham*, 1986-ERA-9. A complainant's subjective belief that his compliance would result in a violation is insufficient as the belief must be reasonable. *Kesterson v. Y-12 Nuclear Weapons Plant*, 1995-CAA-12 (ARB Apr. 8, 1997). Here, Kinser's belief that familiarity with the work performed on the aircraft was necessary in order to sign off on

the C-check is not reasonable. The GMM listed the procedures for signing off on a C-check, which required that the quality control inspector review the MM-08 for required signatures and ensure that all MM-409s were present. Kinser had access to the GMM, had been trained in the procedures detailed within it and was familiar with it. Therefore, I find his belief, that signing off on a C-check with which he was unfamiliar would be a violation, to be unreasonable. I conclude that the record demonstrates that Kinser was not asked to perform a work assignment in violation of the GMM or FAA regulations and that Kinser's refusal was not based on a reasonable belief that he would be violating the GMM or regulations. Thus, in his refusal to sign off on the April 10, 2002 C-check, Kinser did not engage in protected activity.

Kinser's refusal to sign off on the aircraft 513 C-check on July 2, 2002 is almost identical to the April 10, 2002 refusal. As discussed in the Findings of Fact, I find that I cannot credit Kinser's testimony that George requested that he sign off on the aircraft 513 C-check before it was completed. Kinser's oral testimony was inconsistent, in conflict with other credible testimony, and conflicted with written statements given contemporaneously with the incident. As with the April 10, 2002 refusal, the record supports a finding that Kinser declined to sign off on the July 2, 2002 C-check because he was unfamiliar with the work performed on that aircraft. This is supported by Kinser's own testimony and written statements and George's testimony and written statements. Like the April refusal, I find that Kinser refused to sign off on the aircraft 513 C-check because he was unfamiliar with the work that had been performed on that aircraft. Kinser declined for this reason in spite of the May 15, 2002 coaching letter that explained the proper procedure for signing off on a C-check. As I found with the April 10, 2002 incident, I find that Kinser was not requested to perform a work assignment in violation of the regulations or GMM on July 2, 2002, and did not have a reasonable belief that he would be in violation of law by complying with the request. Therefore, I find that Kinser did not engage in protected activity on July 2, 2002 by refusing to sign off on the aircraft 513 C-check.

On August 13, 2002, Kinser filed an AIR 21 whistleblower complaint with the Department of Labor and thereby engaged in protected activity. Filing a complaint or charge of employer retaliation because of safety and quality control activities is protected activity. 49 U.S.C. §42121(a)(1)-(4) (2002);

McCuistion v. TVA, 1989-ERA-6 (Sec'y Nov. 13, 1991); *Bassett v. Niagara Mohawk Power Co.*, 86-ERA-2 (Sec'y Sept. 28, 1993).

Adverse Employment Action

Complainant must demonstrate by a preponderance of the evidence that he suffered an adverse employment action. The regulations define an adverse employment action to include an employer's acts to "intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee." 29 C.F.R. §1979.102(b) (2002). The Sixth Circuit offers as examples the following as constituting adverse employment actions:

> Termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Hollins v. Altantic Co., Inc., 188 F.3d 652, 661 (6th Cir. 1999) (quoting *Crady v. Liberty Nat'l Bank & Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993).

Within the statutory limitations period, Complainant contends that he suffered the following adverse employment actions: (1) the May 15, 2002 coaching letter; (2) the 4-day suspension effective on July 18, 2002; (3) Complainant's October 1, 2000 furlough; (4) the rescission of Complainant's RII designation; and (5) the attempt to discipline Complainant for not reporting as a mechanic at the beginning of October of 2002.

I find the May 15, 2002 coaching letter to be an adverse employment action. This was a written letter, which required the signatures of both Kinser and Miller. (JX 22). The letter constituted a "written warning" and was to be "inserted into [Kinser's] personnel file for a period of one year." Furthermore, the letter contained the admonition that "additional infractions" would result in "further disciplinary action." Although the coaching letter had no economic impact on Kinser's employment, economic loss is not required in order for an action to be adverse. *DeFord v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983). The coaching letter was more than a criticism of Complainant's work performance. As the letter was to be contained in Kinser's personnel file and had the potential to act as a basis for more serious subsequent disciplinary

action, I find the coaching letter to be an adverse employment action. *Weeks v. New York State*, 273 F.3d 76, 86 (2nd Cir. 2001).

Complainant's suspension also constitutes an adverse employment action. Respondent argues that because Complainant never lost wages for the suspension, that the action is not an adverse action. However, as discussed above, economic loss is not a necessary element of an adverse employment action. *DeFord*, 700 F.2d at 287. Complainant's suspension was accompanied by a written notice of suspension, which required the signatures of Kinser and Miller. (JX 29). The letter warned that "additional infractions" would result in "further disciplinary action, which may include termination." I find the July 18, 2002 suspension to be an adverse employment action.

Respondent does not contest that the October 1, 2002 furlough and the rescission of Complainant's RII designation also constitute adverse employment actions. The furlough resulted in Kinser's loss of employment, although temporary, and loss of the inspector position. The rescission of the RII designation resulted in a loss of pay and loss of authority. I find both of these actions to constitute adverse employment actions.

Finally, I find the attempt to discipline Complainant for work absence as a mechanic after the furlough not to be an adverse employment action. The record reveals that a misunderstanding and a lack of prompt communication on the part of management led to Complainant's work absence. A hearing was held on the matter and no discipline was issued. Complainant suffered no disciplinary action or repercussions from this incident. Therefore, I find this event does not constitute an adverse employment action.

Protected Activity as a Contributing Factor in Adverse Employment Actions

A complainant need not have direct evidence of discriminatory intent. Circumstantial evidence is permissible evidence of discriminatory intent. *See Frady v. Tennessee Valley Authority*, 1992-ERA-19 and 34, slip op. at 10 n. 7 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (6th Cir. 1983).

Where a complainant's allegations of retaliatory intent are founded on circumstantial evidence, the fact finder must

carefully evaluate all evidence pertaining to the mindset of the employer and its agents regarding the protected activity and the adverse action taken. *Timmons v. Mattingly Testing Services*, 1995-ERA-40 (ARB June 21, 1996). Rarely will a whistleblower case record contain testimony by a member of management which would support a finding of linkage between the protected activity and the adverse employment action. Fair adjudication of whistleblower complaints requires "full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Id.* at 5.

Retaliatory intent may be expressed through "ridicule, openly hostile actions or threatening statements." *Id.* at 5. In determining whether retaliation has taken place, it is also relevant to look at past practice of the employer to determine whether there has been disparate treatment.

Complainant has proven by a preponderance of the evidence that he engaged in protected activity under the Act and that he suffered adverse employment actions. Finally, Complainant must demonstrate that his protected activity was a contributing factor in the adverse action that he suffered.

Complainant argues that the May 15, 2002 coaching letter was not in response to his April 10, 2002 refusal to sign off on the C-check, but that it was in retaliation for his report of safety complaints to Mike Anderson in March of 2002. Complainant contends that Miller and other management at Mesaba would have been aware of Kinser's complaints at that time due to the release of Anderson's reports. Complainant proposes three reasons for this assertion. First, Complainant points to the delay in issuing the coaching letter more than a month after the April 10, 2002 refusal. Second, Complainant argues that the practice at Mesaba was to allow employees to decline a particular work assignment if the employee felt uncomfortable performing the assignment. Kinser alleges that on April 10, 2002, Miller asked whether he was "comfortable" signing off on the C-check. Therefore, Complainant contends that this language permitted him to refuse to perform the task if he was uncomfortable in doing so and would not be penalized for declining. Third, Complainant asserts that the absence of communication between Miller or any member of management and Kinser over the April 10, 2002 incident until May 15, 2002 indicates that it was not the true reason for issuing the coaching letter.

Employer responds that the coaching letter given to Kinser on May 15, 2002 was in response to his actions of April 10, 2002 in refusing to sign off on the C-check because he was unfamiliar with the work performed on that aircraft. Employer supports this contention with the documents and testimony of record. Kinser's own written statements and testimony are inconsistent on this subject. Kinser did not allege that he was asked to sign off on an incomplete C-check until the grievance hearing in July of 2002. Therefore, Employer argues that it could not have considered that Kinser refused to sign off on an incomplete C-check when Kinser only made that allegation two months after the coaching letter had been issued. In addition, Employer contends that Baker was the ultimate decision-maker and author of the coaching letter and that there is no evidence that he held any animus toward Kinser.

The record does not support a contention that the May 15, 2002 coaching letter was given to Kinser in response to his safety reports to Mike Anderson in March 2002. Anderson published the report on April 4, 2002. (JX 12). Temporal proximity may be a factor in showing an inference of causation; however, a lack thereof is also a consideration, particularly when the record reveals a legitimate intervening basis for the adverse action. *Evans v. Washington Public Power Supply System*, 1995-ERA-52 (ARB July 30, 1996)(citing *Williams v. Southern Coaches, Inc.*, 1994-STA-44 (Sec'y Sept. 11, 1995)). On April 10, 2002, Kinser declined to sign off on an aircraft C-check. Kinser testified that he did not feel comfortable signing off on the C-check because he was unfamiliar with the work performed on that aircraft. (Tr. 113). He repeated this statement in an April 16, 2002 e-mail to Miller. (JX 16). Miller forwarded this information on to Baker. Mesaba's GMM, based on the FAA regulations, does not require an inspector to be familiar with the work performed during a C-check on an aircraft in order to finalize the C-check by signing off on it. The record supports a finding that Kinser did not understand or was not aware of the GMM procedures for signing off on a C-check. Kinser had not worked on any C-checks since his move to the night shift in August of 2001. (Tr. 297). On April 10, 2002 Kinser declined to sign off on a C-check for an invalid reason based upon Mesaba's GMM. This is a legitimate basis for a coaching letter.

Complainant asserts that it was a practice at Mesaba to permit an employee to decline a work assignment if he or she was uncomfortable performing that assignment. Support for this statement in the record is found in the testimony of Aaron Perry, who was uncomfortable performing maintenance in the fuel

cell tank due to claustrophobia. I find that the record does not support a finding that any statement that an employee was uncomfortable performing a work assignment would excuse that employee from that assignment. Perry's testimony demonstrates that if an employee felt uncomfortable performing a task because he or she feared for his or her safety or was unable to safely perform the task, his or her refusal would be excused and a volunteer would be sought. Kinser declined to perform a work task that was part of his duties and which did not impact his personal safety. I find Complainant's contention in this regard to be without merit.

Finally, Complainant argues that the absence of communication from April 10, 2002 until May 15, 2002 regarding his refusal to sign off on the C-check indicates that another reason existed for the coaching letter. I find this argument also to be without merit. Kinser, Holman, and George all testified to a general lack of communication between Miller and the Quality Control employees. Kinser and Miller had a strained working relationship, and both sought to avoid contact with the other. Furthermore, Kinser and Miller worked opposite shifts and had little interaction. The record contains several e-mails throughout the month of April regarding Kinser's refusal. Baker testified that several drafts of the coaching letter were written by Miller, which he reviewed. In the end, Baker drafted the final coaching letter. Thus, the record demonstrates that the process of preparing the coaching letter continued throughout April and May which explains the "delay" in presenting Kinser with the letter.

I conclude that Complainant has not demonstrated by a preponderance of the evidence that the May 15, 2002 coaching letter was a discriminatory retaliation for his safety reports to Mike Anderson in March of 2002.

Next, Complainant asserts that the four-day suspension was retaliatory. Complainant contends that the suspension was in response to his refusal to sign off on the July 2, 2002 C-check before the inspection was complete. As previously discussed, I find Claimant's testimony regarding his refusal to sign off on the July 2, 2002 C-check to be inconsistent and I choose to credit the testimony of George, who recalled that Kinser refused to sign off on the C-check because he was unfamiliar with the work performed on the aircraft. I find that Complainant did not engage in protected activity by refusing to sign off on the July 2, 2002 C-check. Therefore, Employer's discipline of Kinser for this incident is not retaliatory.

Furthermore, Complainant argues that the four-day suspension was too severe as the prior refusal in April was not actually a refusal. As discussed above, I find Complainant's contention that an employee could refuse to perform a work assignment if he was uncomfortable doing so to be without merit. I find that the coaching letter was justified and that the four-day suspension for a second infraction is reasonable. The record contains no objective evidence to suggest that suspension for a second infraction is extraordinary. I find that Claimant has failed to demonstrate by a preponderance of the evidence that the July 18, 2002 suspension was retaliatory.

In September of 2001, employees at Mesaba were informed of a furlough. Complainant received a letter stating that his position was subject to furlough effective October 1, 2001. Complainant contends that his selection for furlough was a discriminatory act in retaliation for engaging in protected activity. The record does not support this contention. Schaefer testified that furloughs occurred at Mesaba every six months. (Tr. 548). The Fall 2002 furlough was company-wide and affected employees other than Kinser and at other maintenance bases other than Cincinnati. In the Quality Control department, Kinser and another, more senior inspector, were furloughed. George, who had less seniority than Kinser, resigned prior to the furlough notice and his position was not to be filled. Complainant has failed to demonstrate that his October 2001 furlough was retaliatory.

After the October 1, 2002 furlough, Kinser was able to continue working for Mesaba as a mechanic. On October 3, 2002, he received an e-mail from Miller informing him that his RII designation was rescinded as of October 1, 2002. Complainant argues that Miller rescinded his RII designation in retaliation for filing a whistleblower complaint on August 13, 2002. Complainant contends that not only are the events close in time, but that Miller treated Kinser differently by rescinding his RII designation and not those of less senior mechanics. I find Complainant's argument without merit. The record does not demonstrate that Miller was aware of Kinser's complaint at the time he rescinded Kinser's RII designation. Kinser's complaint triggered an FAA investigation and thus Miller would have become aware that a complaint had been filed. The record reveals that Miller spoke with FAA investigators on February 13, 2003. (CX 13). However, there is no evidence that Miller was aware of Kinser's complaint or the FAA investigation until that date, by which time Kinser had already resigned from Mesaba.

Employer responds that Miller rescinded Kinser's RII designation because he had shown a reluctance to use it as an inspector. Miller's testimony reflects this. Miller's actions may have been in violation of a union agreement or employment contract, but the record does not support a finding that the rescission of the RII designation was retaliatory.

In sum, Complainant has failed to demonstrate by a preponderance of the evidence that his protected activities were a contributory factor in the adverse employment actions he suffered. Therefore, this claim must be denied.

Frivolous Complaint

AIR 21 includes a provision that permits an award of attorney's fees, up to $1,000, to the employer if the complainant has brought a claim in bad faith or the claim is frivolous. 29 C.F.R. §1979.109(b) (2002). Legislative history of AIR 21 reveals that although "frivolous" is not defined by the Act, "unfounded complaints potentially linked to other job-related matters" would be included. H.R. 106-167 (May 28, 1999). The United Stated Supreme Court has held that an award to a defendant in a Title VII employment discrimination claim should be permitted "to deter the bringing of lawsuits without foundation, to discourage frivolous suits, and to diminish the likelihood of unjustified suits being brought." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 699-700, 54 L.Ed.2d 648 (1978).

The Sixth Circuit has held that imposing sanctions against complainants may have the effect of chilling appeals or claims that involve "serious, controversial, doubtful or even novel questions." *Wilton Corp. v. Ashland Castings Corp.*, 188 F.3d 670 (6th Cir. 1999). However, the Court also determined that sanctions are appropriate where the claim was brought for purposes of harassment, delay or "other improper purposes." *Wilton*, 188 F.3d at 676 (citing *Dallo v. INS*, 765 F.2d 581, 589 (6th Cir. 1995). A complaint is frivolous if it lacks an arguable or rational basis in law or fact. *Brown v. Bargery*, 207 F.3d 863, 866 (6th Cir. 2000); *see also Hill v. Potter*, 48 Fed. Appx. 198 (6th Cir. 2002) (unpublished).

Respondent argues that it is entitled to a partial recoupment of attorney's fees, contending that Complainant's claim never had any merit. Respondent bases this contention on its assertion that Kinser never suffered an adverse employment

action. The goal in filing the claim, Respondent argues, is to exact a personal vendetta against his former manager Miller. This would be an inappropriate use of the AIR 21 whistleblower protection provisions and would entitle Respondent to an award.

Complainant contends that he engaged in protected activity and suffered adverse employment actions. Kinser believed that Miller's actions were motivated by displeasure with Kinser's reporting of safety violations. He contends that this claim was brought in good faith.

Kinser was able to establish that he engaged in protected activity and that he suffered adverse employment actions. Although Claimant was ultimately unable to prove by a preponderance of the evidence that his protected activities were a contributing factor in the adverse employment actions, his claim was not necessarily meritless. The United States Supreme Court has held, "the term 'meritless' is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case…." *Christianburg*, 98 S.Ct. at 700. I find that Kinser was understandably suspicious about the motivations behind the adverse employment actions he suffered. The temporal proximity of the adverse actions and the protected activities was sufficient to raise a question of motivation. Complainant was not successful in confirming his suspicions; however, I conclude that his claim was not brought in bad faith and is not frivolous. Therefore, Respondent is not entitled to a partial recoupment of attorney's fees.

CONCLUSION

It is my conclusion that Jaison E. Kinser was not disciplined or discriminated against for any activities protected by the Act.

RECOMMENDED ORDER

I recommend that Jaison E. Kinser's claim for money damages and attorney's fees be DENIED.

A

Rudolf L. Jansen
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110 (a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21, 2003).